Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

N.A.S. HOLDINGS, INC.,

Petitioner,

v.

CONNIE PAFUNDI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process rights of the record title owner of real property were violated when the Supreme Court of Vermont shifted the burden of proof and production from the adverse possessor to the record title owner to show that an adverse possessor did not maintain an open, continuous, exclusive, adverse, and notorious use and possession of the property for the statutorily required period of time.

2. Whether the Supreme Court of Vermont violated Petitioner's constitutional right to property and due process, when it awarded the adverse possessor title to property for which no actual use was established by any record evidence, for an undetermined tract of land, under a theory of constructive possession, based upon the natural features of the land, which existed prior to and independent of the adverse possessor's use of property, and where there was no color of title or evidence of use or control by the adverse possessor.

3. Whether the Supreme Court of Vermont violated Petitioner's right to property and due process when it held that an adverse possessor could acquire title to the walls of an open quarry, which walls provide lateral and subjacent support to the surface of the record title owner's land.

4. Whether the Supreme Court of Vermont violated Petitioner's property and due process rights when it held that the predecessor record title owner acquiesced to the boundary line absent record evidence of acquiescence.

5. Whether quarrying or vehicle traversing or parking, without evidence of a permanent intent to exercise dominion and control over the property, constitute possessory acts for purposes of adverse possession or are mere acts of trespass.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, N.A.S. Holdings, Inc., and the Respondent, Connie Pafundi. The Respondent before this Honorable Court is Connie Pafundi.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, N.A.S. Holdings, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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The Petitioner, N.A.S. Holdings, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Vermont, entered in the above titled proceeding on July 2, 1999, rehearing denied August 2, 1999.

OPINIONS BELOW

The Opinion of the Supreme Court of Vermont is reported at 736 A.2d 780 (1999), and is reprinted in the appendix hereto, p. 1a, *infra*.

The memorandum decision and findings of fact of the Rutland Superior Court is reprinted in the appendix hereto, p. 17a and 24a, *infra*.

STATEMENT OF JURISDICTION

Petitioner invokes the Fifth and Fourteenth Amendments of the United States Constitution as grounds for federal jurisdiction. The judgment of the Supreme Court of Vermont, entered on July 2, 1999, reversed in part and affirmed in part the Superior Court's decision entered on October 1, 1997. The Supreme Court of Vermont denied a timely petition for rehearing on August 2, 1999. This Court's jurisdiction to review the judgment of the Vermont Supreme Court is based upon 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution declares that "no person shall . . . be deprived of life, liberty or property, without due process of law." U.S. Const., amend.

V. While the Fifth Amendment applies only to the federal government, the Fourteenth Amendment extends the application of the Fifth Amendment to the individual states of the United States. The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

This case presents critically important questions regarding the rights of property owners based upon the Supreme Court of Vermont's blatant repudiation of principles of *stare decisis* in an action for adverse possession. The court abruptly departed from long standing and well established concepts of property law which form the basis for title certification, conveyance and compromise the marketability of real property which is the cornerstone of American society. Jurisdiction is grounded in the United States Constitution, as the controlling instrument of our government. The Constitution declares that no man shall be deprived of life, liberty and property without due process of law. U.S. Const., amend. V and XIV, § 1. Under the Constitution, private property rights are inviolate. The Supreme Court of Vermont denied the Petitioner's right to property and due process of law in its decision to deseize Petitioner of its property without due process. The court shifted the burden of proof and production from the adverse claimant to the record title holder. The Supreme Court of Vermont erroneously held that Respondent had achieved adverse possession of Petitioner's real property despite the lack of record evidence to substantiate such a ruling. The Vermont court also violated Petitioner's right to property and due process of law when it held Respondent achieved adverse possession of the quarry

walls that are the subsurface face of Petitioner's coterminous land. These quarry walls provide lateral and subjacent support for Petitioner's property. In light of the finality of the Supreme Court of Vermont's decision, the Petitioner has been denied its property rights and due process rights as guaranteed under the United States Constitution.

Jurisdiction further relies upon an exception to the general rule and mandates that this Court review a state court's finding of facts when they violate the Petitioner's constitutional rights. *See Nor. Pac. Ry v. North Dakota*, 236 U.S. 585, 593 (1916); *Bowe v. Scott*, 233 U.S. 658, 663 (1914). Specifically, a finding of fact by a state court will be reviewed if a "federal right has been denied as the result of a finding shown by the record to be without evidence to support it." *Aetna Line Ins. Co. v. Dunken*, 266 U.S. 389, 394 (1924); *see also Fiske v. State of Kansas*, 274 U.S. 380, 385-86 (1927); *Garner v. Louisiana*, 368 U.S. 157, 163 (1961). Under the second exception set forth in *Fiske*, this Court has the power to make an independent examination of facts that are intermingled with legal conclusions when necessary to determine whether a party has been deprived by a state court of a right secured by the Constitution. 274 U.S. at 385-86. Here, the case at bar involves a mixed question of law and fact. The record below lacks any evidence supporting the Vermont court's decision regarding constructive possession, boundary lines, acquiescence to boundary lines by the Petitioner or its predecessors, and proof of adverse possession requirements. *See Thompson v. Louisville*, 362 U.S. 199, 205-06 (1960). The patently erroneous and unsubstantiated decision of the Supreme Court of Vermont has deprived Petitioner of its property and due process right secured by the United States Constitution and constitutes a clear

miscarriage of justice which will damage record title rights of all private property owners if it is left to stand.

Finally, jurisdiction is based upon this Court's decision in *Saunders v. Shaw*, 244 U.S. 317 (1917). Specifically, this Court noted in *Saunders* that:

> when the act complained of is the act of the [state] supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.

See id. at 320. In the present case, the decision by the Supreme Court of Vermont constitutes an abandonment of long settled principles of *stare decisis* when it ultimately vested title to Petitioner's property in Respondent without consent of Petitioner and without any record evidence. The decision gave Respondent fee title and, therefore, ability to quarry the disputed land beyond the surface of the quarry face which will destroy the lateral and subjacent support for Petitioner's coterminous property. The decision additionally may sever Petitioner's mineral rights in its own subsurface property. Petitioner could not address these actions since the Vermont court denied rehearing on the issues.

This case involves a claim of adverse possession by Respondent against Petitioner, the record title holder of a 52-acre parcel. Petitioner purchased this land from the Rising and Nelson Slate Company under a Warranty Deed in 1992. Located upon Petitioner's parcel is a quarry. When Petitioner enter the west side of the land to commence quarrying,

Respondent blocked Petitioner's access. Petitioner commenced suit and proved record title, which finding entered and was not appealed. Respondent was awarded title by adverse possession to the quarry floor.

Along the west boundary of the parcel purchased by Petitioner is a surface quarry from which Petitioner attempted to remove slate. There is a slant wall on the west side of the quarry that holds sea green slate. This quarry also has a vertical wall on the east, known as the east butt, which is the face of the subsurface land of Petitioner. The east wall or butt is approximately one hundred feet in height and contains black slate. On surface of the land, which constitutes both the west and east quarry walls, lie slate dumps. These slate dumps existed prior to and independent of any use of the disputed land by Respondent.

Respondent's father-in-law, Pafundi, purchased a quarry from Scott in 1971. In 1972, Pafundi purchased additional property from Scott, an absentee landowner, which land is adjacent to and bound by Petitioner's parcel. Respondent claimed ownership of the surface quarry within the western boundary of Petitioner's property through record title and through adverse possession. Respondent's claim to the record title failed in that Respondent's deed described the eastern boundary of Respondent's land purchased in 1972 as "the westerly boundary of the lands of Rising and Nelson [former owner of the Petitioner's property]."

In 1972, Pafundi began quarrying operations in the area of the west slant, along the west boundary, of the disputed land. Pafundi primarily quarried the west slant for sea green slate. Pafundi had a stroke in 1974 and did not return to work after that time. Pafundi died in December 1979. No quarrying

activity occurred for two years after Pafundi's stroke. Pafundi's son commenced quarrying in the east butt in 1980. No quarrying occurred from October 1981-January 1983 or November 1983-February 1985. No quarrying of the east butt has occurred since Pafundi's sons' death on March 8, 1989. Furthermore, there was no evidence of vehicle usage on the disputed parcel prior to 1979.

The Superior Court held that Respondent did not have record title to any of the land in dispute. The court further held that because there was no document purporting to convey title to Respondent or her predecessors in title to any of the Petitioner's land, Respondent did not establish adverse possession to the disputed land by constructive possession. The Superior Court correctly held Respondent had to show actual possession of each area claimed for the statutory time period to gain title to the respective areas. The court also held that Pafundi failed to use or occupy the west slant of the quarry for the statutory period of fifteen years. The Superior Court further held that Pafundi's son failed to use or occupy the east face of the quarry for fifteen years. Consequently, neither Pafundi nor his son established title through adverse possession to either of the quarry walls. The Superior Court did find, however, that although there was no permanent structure of any type erected on the disputed land, between the activities of Pafundi and his son and the presence of vehicles in the quarry, they did acquire title by adverse possession to the area between the walls called the quarry floor.

Respondent appealed to the Supreme Court of Vermont claiming title to the entire quarry as a single economic unit. The Petitioner cross appealed based upon lack of record evidence to prove adverse possession. Upon review, the

Supreme Court of Vermont held that because Pafundi and his son engaged in possessory acts with respect to portions of the quarry floor for the statutory fifteen year time period, the Petitioner had failed to prove that the use was not that of an average quarrier. The Supreme Court of Vermont further declared that the trial court erred in failing to apply the doctrine of constructive possession because the court failed to assess "the evidence in light of the fact that this [quarry] was a clearly bounded piece of property, instead of first assessing actual use, and only then considering on an abstract level whether the parcel was a 'single physical and economic unit.' " The Supreme Court of Vermont remanded the case for determination of the boundaries of this "clearly bounded" property. The Supreme Court of Vermont further found, with no record evidence, that the slate dumps which preexisted the Respondent's use and which were of unknown origin, were boundaries. In effect, the Vermont Supreme Court utilized the erroneous theory of constructive possession based upon the "slate dumps" to increase the title grant from the quarry floor, approximately 3 acres, to 22.08 acres to the outer limits of the slate dumps. The slate dumps on either side of the quarry, according to the Vermont court, depict the boundaries of the quarry by acquiescence. The court then ordered boundary findings consistent with their decision. The Supreme Court of Vermont also stated that Petitioner "acquiesced to whatever boundary line the Respondent observed" with no evidence. In essence, the decision of the Vermont Supreme Court lacks any evidentiary basis and is a completely unreasoned abandonment of 200 years of Supreme Court precedence on the issue of adverse possession. As such, the fatally flawed reasoning and illogical outcome set forth by the Vermont Supreme Court materially jeopardizes record title rights to property established by deed in favor of unproved and unbridled

squatter's rights that will undermine surveyed, deeded property title rights nationwide if this bizarre and aberrant decision is not summarily reversed.

REASONS FOR GRANTING THE WRIT

I.

THE SUPREME COURT OF VERMONT'S DECISION CONFLICTS WITH CASE LAW OF THE UNITED STATES SUPREME COURT.

This Honorable Court must grant this petition for certiorari because the Supreme Court of Vermont violated Petitioner's right to property and due process of law. The Supreme Court of Vermont, in its unwarranted departure from *stare decisis*, unilaterally shifted the burden of proof and production from the claimant of adverse possession to the record title owner to show that an adverse possessor did not demonstrate each element of adverse possession. This Court noted that:

> when a party claims by a disseisin ripened into a good title by the lapse of time against the legal owner, he must show actual, open, exclusive, and adverse possession of the land. All these elements are essential to be proved, and failure to establish any one of them is fatal to the validity of the claim.

Ward v. Cochran, 150 U.S. 597, 607 (1893), *quoting Cook v. Babcock*, 11 Cush. 208, 65 Mass. 206 (1853). Furthermore, this Court noted in *Armstrong v. Morrill*, that "it is well settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted, as well as

open, notorious, actual, exclusive and adverse." 14 Wall. 120, 81 U.S. 120 (1871). The Vermont and all other state requirements for adverse possession mirror the elements set forth by the Supreme Court of the United States in its decisions.

The Supreme Court of Vermont departed from all known long standing precedent when it decided the case at bar contrary to the decisions of this Court and prior decisions of state and federal courts regarding the well established and long standing principle of law that the adverse possessor has the burden of proof and production. This blatant conflict between the previous decisions of this Court and state and federal courts nation-wide demonstrate the urgent need for the Court to review this patently erroneous decision of the Vermont Court. *See McElroy v. United States*, 455 U.S. 642, 643 (1982). There is no material difference of opinion or of statute in the various states as to the elements of adverse possession or the burden of proof and production established by this Court. As such, the Vermont court's abrupt, unreasoned and illogical departure from this well settled and long standing precedent mandates review by this Court.

The Vermont court impermissibly shifted the burden of production and proof to the record title holder when it stated that the record title owner did not present any evidence to demonstrate what constitutes average quarry use. The burden of proof and production, that the adverse possessor made use of the land consistent with that of the average owner, are clearly that of the adverse possessor. The adverse possessor has the burden to demonstrate each element of a *prima facie* cause of action for adverse possession, including continuity of use. If the use is not continuous, the adverse possessor must show that the use is consistent with the use of an average owner for land of that nature, or in this case,

average quarry use. The decision departs from well settled principles of record title and right to subjacent support. In light of the stark conflict between decisions of the Supreme Court of the United States and the Supreme Court of Vermont, as well as the conflict between this decision and well settled law in each jurisdiction, this Honorable Court must review the case at bar.

II.

THE SUPREME COURT OF THE UNITED STATES MUST REVIEW THE PATENTLY ERRONEOUS DECISION OF THE SUPREME COURT OF VERMONT BECAUSE IT IMPACTS ALL PROPERTY OWNERS BECAUSE IT JEOPARDIZES WELL SETTLED AND TRADITIONAL CONCEPTS OF PROPERTY LAW.

This Honorable Court must review the decision of the Supreme Court of Vermont because its decision undermines numerous well-settled rules of property law and calls into question record title in virtually every state. The irreconcilable conflict that this decision creates in an area of well-settled and long-standing principles of real property law mandates review by this Court. Immediate review will prevent further unnecessary and costly litigation, which will destabilize property rights and title. Not only does the decision contradict the rule that a property owner owns all the space directly above and the land directly below the surface of said property, but it also negates the concept of subjacent support. Furthermore, the Supreme Court of Vermont's decision wrongfully shifts the burden of proof and production of adverse possession of property established by this Court in *Cook v. Babcock*, 11 Cush. 208, 65 Mass.

206 (1853), which states that the burden of proof is on the adverse possessor, and was reaffirmed in 1893 in *Ward v. Cochran*, 150 U.S. 597 (1893).

The decision of the Vermont Supreme Court repudiates the long established law of adverse possession. This abrupt and unwarranted departure from these well-settled rules has serious repercussions upon the status of property law and the rights of property owners. Issues of adverse possession, trespass, and nuisance occur regularly in the court system and affect the general public at large. These rules form the basis for the review and certification of property title in conveyances on a daily basis. The conveyance of fee title with warranties will be destroyed by the taint which claims of adverse possession will cause and will destroy the marketability of title. These rules of adverse possession impact the validity of property surveys and virtually all abutting land owners property rights. Private property rights are the cornerstone of this country's free market economy and are integral to our system of democracy. The foundation of our society's understanding that real property rights are inviolate is premised upon common law and secured by the Fifth and Fourteenth Amendments. As such, property rights and unencumbered transferability of private property require uniformity of the law, which uniformity is shattered by aberrant rejections of long standing *stare decisis* such as the one handed down in this case by the Supreme Court of Vermont. This Vermont decision not only conflicts with case law of the United States Supreme Court, but also with state courts and federal circuits. The Vermont court's decision will affect the decisions of the Second Circuit. The Second Circuit decisions in turn will conflict with other Federal Circuit decisions on adverse possession ultimately leading to conflicts among the Circuits. Any conflict between federal

circuits weakens long settled principles of common law among the states and uniformity of law among the circuits upon which property rights and free transferability of title rely. This decision's conflict with settled principles of law is so blatantly apparent, and the decision so contrary to these established principles of law, that this Court must take immediate action to prevent whole sale reexamination of real property rights.

Finally, the decision of the Supreme Court of Vermont casts doubt on record title of all property. If the Vermont court decision stands, all record title owners now must question their title based upon the Vermont Supreme Court adoption of constructive possession based upon the natural features of the land. The natural features of land do not necessarily determine boundary lines. Frequently, natural features are changed or altered by acts of nature. One's property line cannot be subject to claims and altered merely based upon a natural feature, which may exist or may be altered by forces of nature. To subject property boundaries to continuous redefinition based upon existing or changing natural features of the land will nullify most, if not all, land surveys completed by the United States Geological Survey, especially in areas which are sparsely populated where natural features such as mountains and rivers do not correspond to surveyed boundaries. Record title holders who do not occupy the property will be subject to claims of adverse possession based, not upon traditional proof of actual dominion and control but rather, on their failure to prove lack of adverse possession and will be disseized to the limits of the natural features of the land. Large tracts of land, for which survey lines are not consistent with natural features, will be subject, without more, to the theory of constructive adverse possession causing the potential for unlimited

disseisin of record title holders and numerous fraudulent claims of adverse possession. Because this aberrant decision by the Supreme Court of Vermont damages vested record title rights and distorts traditional, long-standing real property law, the decision must be reviewed and reversed.

III.

THE SUPREME COURT OF VERMONT DECISION TO GRANT RESPONDENT TITLE TO THE DISPUTED LAND BY ADVERSE POSSESSION NOT BASED UPON RECORD EVIDENCE WAS PATENTLY ERRONEOUS AND MUST BE REVERSED.

A. The Supreme Court of Vermont Erroneously Held Respondent Adversely Possessed the Real Property at Issue.

The Supreme Court of Vermont violated Petitioner's right to property and due process of law by holding that Respondent achieved title to the land at issue, because there is no record evidence to demonstrate each element of adverse possession. To prove adverse possession, the claimant must demonstrate "continuous and uninterrupted as well as open, notorious, actual, exclusive, and adverse" possession. *See Armstrong*, 81 U.S. at 145-46, *citing Cook v. Babcock*, 11 Cush. 208, 65 Mass. 206 (1853); *Hodges v. Eddy*, 38 Vt. 327, 338 (1865); *Miller v. Warner*, 433 S.W.2d 259, 262 (1968). Respondent did not prove each element of adverse possession; specifically, Respondent failed to show continuous use. At no time did the trial court doubt that the Respondent had failed in her burden to demonstrate the elements of adverse possession as to the quarry walls. Further, Respondent did not present any record evidence

which demonstrated that the use made of the quarry was that of an average quarrier.

Where use is not continuous, Respondent must demonstrate that the use made of the land is consistent with the use that the average owner would make of the land. *See Aldrich v. Griffith*, 29 A. 376, 379, 66 Vt. 390 (1893). In this case, it is undisputed that the average use is use as a quarry. It was incumbent on the Respondent, therefore, to demonstrate the element of average quarry use. The Respondent patently failed in this burden, as noted by the Supreme Court of Vermont when it impermissibly shifted the burden of proof and production on this issue on to the Petitioner. The Vermont court held that the Petitioner had to show that Respondent did not use the quarry as would an average quarry owner. Not only are the burden of proof and production under traditional concepts of adverse possession on the Respondent, but the fact that the Supreme Court of Vermont shifted these burdens to Petitioner, to show that the use was not that of an average quarrier, demonstrates that the record was barren of any evidence of average quarry use. Because Respondent presented no evidence of the average quarry use, there could be no finding that the Respondent's use was that of an average quarrier, and therefore, an essential element of adverse possession was lacking. In light of this decision, which shifted the burden of proof and production to the Petitioner who was the record title holder, the Supreme Court of Vermont violated Petitioner's right to property and due process of law and aberrant decision must be reversed.

Respondent did not show continuity of use of the entire quarry and cannot achieve adverse possession. While it may not be necessary for the adverse possessor to continuously

occupy the land at issue, it must show continuity of use, particularly when there is no deed. *See Community Feed Store v. Northeastern Culvert Corp.*, 151 Vt. 152, 156 (1989); *Hodges*, 38 Vt. at 338. To demonstrate continuity of possession, Respondent must show continuous use of the quarry, and that the use was consistent with that of an average quarry person. *See Aldrich*, 29 A. at 379, *quoting Webb v. Richardson*, 42 Vt. 474 (1869) (stating that "the kind and frequency of the acts of occupancy necessary to constitute a continuous possession depend somewhat upon the condition of the property, and the uses to which it is adapted in reference to the circumstances and situation of the possessor"). No evidence was presented at trial to demonstrate what acts constitute average use. Contrary to case law, the Supreme Court of Vermont noted that the record title owner presented no evidence to demonstrate what constitutes average use of a quarry. The court, therefore, impermissibly shifted the burden of proof and production in violation of Petitioner's property and due process rights.

B. The Supreme Court of Vermont Erred When It Awarded Title to the Respondent Based Upon the Theory of Constructive Possession Absent Defined Boundaries Erected by the Adverse Possessor.

The Supreme Court of Vermont violated Petitioner's property and due process rights when it held Respondent established title to the land via constructive possession, based upon the natural boundaries of the quarry existing prior to, and independent of, the adverse possessors' use of the land. The Vermont Supreme Court held that the doctrine of constructive possession should have been applied because the boundaries of the land claimed, a quarry, were defined. Despite its own finding, the Vermont court ordered a hearing

to determine the boundaries of the land claimed using the slate dumps. This order clearly demonstrates that the Vermont Supreme Court knew the boundaries were not defined and that there was no method or manner to define these boundaries based upon a known demarcation placed on the land by Respondent or created by a title document.

The Supreme Court of Vermont's application of constructive possession is clearly erroneous. Under existing case law, the doctrine of constructive possession is limited to situations where the claimant claims title under a defect deed or conveyance instrument. In all situations, the land claimed is clearly defined by deed or demarcation erected by the adverse possessor. *See Jarvis v. Gillespie*, 587 A.2d 981, 155 Vt. 633, 636, 639 (1991). In the instant case, the Supreme Court of Vermont had to order the boundary to be determined because the limits of the quarry were undefined and conflicted with concepts of subjacent support, which the court ignored. Therefore, the doctrine of constructive possession is patently inapplicable. The Supreme Court of Vermont had to order the definition of a boundary because the land claimed is coterminous with, and included in, Petitioner's record title lands. There is no document which purports to convey title to Respondent or her predecessors. There is no fence or other demarcation, which was created by Respondent to signify the limits or extent of Respondent's dominion and control.

Through constructive possession, an adverse possessor may establish title to real property, absent color of title, only when there are definite boundaries delineating the property adversely possessed. *Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 156 (1989); *Langdon v. Templeton*, 66 Vt. 173, 179 (1893). The Supreme

Court of Vermont declared in *Lang v. Clark* that "actual possession of a part of a lot may give constructive possession of the whole lot, if it has boundaries sufficiently well indicated by whomsoever those boundaries may have been 'erected' or indicated upon the land." 81 A. 625, 630, 88 Vt. 222 (1911). *See also Hodges*, 38 Vt. at 346. When an adverse possessor claims title by definite boundaries, the title claimed extends only as far as the adverse possessor actually occupied or possessed the property. *See id.* As such, the Vermont Supreme Court's decision to adopt constructive possession with the need for boundary determination is clearly erroneous.

The Vermont court further erred when it held that the quarry, to which Respondent gained title through adverse possession, was an economic unit and that adverse possession of the quarry floor vested adverse possession to the quarry walls with the slate dumps as the boundary. First, it violates the Petitioner's property and due process rights for the court to make a finding without any record evidence. In fact, it was undisputed that the "slate dumps" which the Vermont court found significant to the boundary definition were in existence prior to any alleged use by Respondent. Further, it is undisputed that the Respondent did not add to, alter or effect in any way the "slate dumps". There is no evidence from any source that these "slate dumps" represent a boundary of any type or nature. Together with the quarry walls, the slate dumps are natural features of the land.

While this Court noted in *Holtzman v. Douglas* that adverse possession was established when a tenant achieved adverse possession by placing his material on the property in a "convenient manner," *Holtzman* does not apply to the case at bar. 168 U.S. 278, 284-85 (1897). At no time did

Respondent demonstrate that she or her predecessors placed the slate dumps on the quarry walls. The Respondent did not even demonstrate that her predecessors created the quarry walls. The mere presence of the slate dumps, therefore, do not constitute acts, which evidence an exercise of dominion and control or use necessary for a finding of adverse possession. Furthermore, the land in dispute is not a stone yard, but rather a stone quarry from which stone is extracted. Respondent has failed to demonstrate that extraction of stone alone demonstrates an intent to exercise dominion and control, and therefore, the mere extraction of stone cannot constitute an act of possession, but rather an act of mere trespass.

C. The Supreme Court of Vermont Violated Petitioner's Property and Due Process Rights When It Held that Respondent Adversely Possessed the Walls of the Quarry.

The Supreme Court of Vermont violated Petitioner's property and due process rights when it held that Respondent, as an adverse possessor, could take title to the quarry walls, which provide subjacent support to Petitioner's property. First there is no evidence that Respondent exercised dominion and control of the quarry walls by quarrying. The nature of quarrying is such that it is the extraction of stone. The only portions of the quarry walls to which Respondent could demonstrate any use or control is the surface plane of the stone because the stone remaining is present, therefore it was not possessed. The stone extracted, which represents Respondent's dominion and control, has been carried away. There can be no claim of the exercise of dominion and control of the stone that remains imbedded in the subsurface strata of Petitioner's land because quarrying, by definition, is

extraction. Because the stone is imbedded in the quarry wall by definition, it has not been used, controlled or possessed by Respondent.

Further, the Vermont court failed to consider the well-settled rule of law that a property owner has title to all the property above and below the surface of their property. The court's decision not only violated Petitioner's right to due process of law, but ultimately will result in the destruction of Petitioner's fee title rights in its property. Petitioner's fee title will be destroyed when the Respondent possesses the quarry walls. The Restatement (Second) of Torts declares that "one who withdraws the naturally necessary subjacent support of land in another's possession . . . is subject to liability . . ." § 820. The Restatement also notes that subjacent support exists "when the supported land is above and the supporting land is beneath it. . . . This is the situation when one person owns an upper stratum of land and another person owns a stratum under it." *See* Restatement (Second) of Torts, Ch. 39, Introductory Note. The quarry walls clearly provide subjacent support to Petitioner's surface land. If Respondent commences quarry operations in the quarry walls, she will ultimately remove the subjacent support to Petitioner's record title lands.

Furthermore, because a property owner has title to all the space above her property and all the land below the surface of her property, when the Supreme Court of Vermont granted Respondent title to any more than the surface of the quarry walls, it granted Respondent title to Petitioner's property below the surface line. The court destroyed the fee title of Petitioner's property without an opportunity for Petitioner to respond, leaving Petitioner with a naked claim to the surface of the property. The court, therefore, can only

give Respondent title to the surface of the quarry walls and anything more will destroy Petitioner's subjacent support and will result in harm to Petitioner.

D. The Supreme Court of Vermont Erred When It Held that Petitioner's Predecessor Acquiesced to the Quarry as the Boundary Line of the Adjoining Properties.

The Supreme Court of Vermont violated Petitioner's property rights when it held that the record title owner acquiesced to the boundary line at issue absent the production of record evidence establishing each element of acquiescence. To establish a boundary line by acquiescence in Vermont, it is essential that adjoining land owners mutually agree upon a particular boundary line to serve as the boundary of their coterminous parcels. Additionally, one or both of these parties must actually and continuously possess the property to the line recognized for the required fifteen-year period. *See D'Orazio v. Pashby*, 150 A. 70, 73, 102 Vt. 480 (1930). Acquiescence arises when the owners of adjacent properties are uncertain as to their common boundary and later enter an agreement to determine the boundary location. *See Real Estate Law Report*, vol. 25, No. 4, September 1995, *Boundaries: When Agreed-Boundary Doctrine is Inapplicable*. The "agreed-boundary" doctrine is followed by several states. The California Supreme Court has held that absent "clear evidence that earlier owners had actually entered into an agreement" the agreed-boundary doctrine does not apply. *See Bryant v. Blevins*, 884 P.2d 103 (Cal. 1994).

No evidence was presented at trial to demonstrate any agreement between Rising & Nelson and Pafundi

establishing any boundary line or more particularly the quarry as the boundary line between the adjacent properties. Petitioner's predecessor in title, Rising and Nelson, did know where the location of the common boundary. There is no evidence Rising and Nelson entered an agreement with Respondent as is required to establish acquiescence. Without any evidence demonstrating uncertainty about the common boundary line and an agreement to establish a boundary line, Petitioner could not have acquiesced in the boundary line and Supreme Court of Vermont decision based on an alleged acquiescence for which there is no evidence is patently erroneous.

E. The Supreme Court of Vermont Erred When It Held that Quarrying and Vehicle Traffic Were Possessory Acts.

The Supreme Court of Vermont erroneously held that Pafundi's quarrying activities amounted to possessory acts necessary to establish fee title adverse possession. In *Seven Springs Farm, Inc. v. King*, the Pennsylvania Superior Court held that intermittent "removal of timber and surface stone only amounts to repeated acts of trespass, insufficient to show possession." 344 A.2d 641, 645 n.7, 235 Pa. Super. 450 (1975). While a witness in *Seven Springs* was testifying that he quarried stone, he stated that:

> 'there's a stone quarry in here where we have quarried stone out for years, it's surface stone, which is back in here . . . we go in . . . every other year or so we're in here. The quarry, this is surface stone, it's not a mined operation'.

The court declared that "plaintiff has merely been removing surface stone from a particular locale on occasion, not

conducting a full-fledged quarrying operation." 344 A.2d at 645 n.7, 235 Pa. Super. at 457. The acts described in this case succinctly describe the acts taken by Respondent's predecessors. Consequently, Respondent could not have achieved adverse possession of the quarry because the quarrying of her predecessors amounted to nothing more than a naked trespass.

The Supreme Court of Vermont erred when it held that Respondent achieved adverse possession through vehicle use. Respondent cannot attain title through adverse possession of the quarry because the quarrying performed by Respondent were acts of trespass. Furthermore, the vehicle traversing of Respondent across the quarry floor was merely incidental to the quarrying and therefore do not constitute an acts of possession, but rather trespass. None of Respondent's acts constitute acts of possession sufficient for the vesting of fee title. *Community Feed*, 151 Vt. at 157. At no time did Respondent demonstrate any dominion and control over the property at dispute. Respondent did not erect a fence, sign, man-made barrier or any other structure on the land to demonstrate possession or prevent occupation of the land by Petitioner. The slate dumps on top of the quarry walls existed prior to and independent of use of the land by Respondent. The traversing and parking of vehicles on the quarry floor are temporary in nature and do not amount to acts of possession. Essentially, the quarry floor had vehicle traffic incidental to the removal of the surface stone. As such, the acts of the Respondent are not, as a matter of law, acts of possession but mere trespass, and the Supreme Court of Vermont erred in its decision. In light of the following, this Honorable Court must grant Petitioner's writ of certiorari and resolve the harms created by the Supreme Court of Vermont.

CONCLUSION

For the above stated reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF VERMONT DATED AND FILED JULY 2, 1999

Supreme Court

No. 98-044

January Term, 1999

N.A.S. Holdings, Inc.

v.

Connie Pafundi

On Appeal from Rutland Superior Court

* * *

PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

JOHNSON, J. This is a case in which the unusual and complicated facts involved can easily draw attention away from the relatively simple legal issues that are the key to resolving the underlying conflict. The dispute arises out of competing claims to ownership of a slate quarry located in West Pawlet, Vermont. Appellant Connie Pafundi challenges a ruling of the superior court holding that she had established, through adverse possession, title to the floor of this quarry but not to its walls. Appellee N.A.S. Holdings, Inc. (N.A.S.), which holds record title to almost the entire property, challenges the trial court's conclusion that appellant had established adverse possession of the quarry floor, and

vigorously opposes appellant's argument that she has established adverse possession of the entire quarry. We affirm in part and reverse in part.

Adverse possession is a mixed question of law and fact. See Montgomery v. Branon, 125 Vt. 362, 365, 216 A.2d 41, 43 (1965). When reviewing the factual findings of a trial court, we view them in the light most favorable to the prevailing party below, disregarding the effect of modifying evidence, and we will not set aside the findings unless they are clearly erroneous. See Brown v. Whitcomb, 150 Vt. 106, 109, 550 A.2d 1, 3 (1988); V.R.C.P. 52(a). The findings will stand if there is any reasonable and credible evidence to support them. See Harlow v. Miller, 147 Vt. 480, 481-82, 520 A.2d 995, 997 (1986). Review of conclusions of law, however, is nondeferential and plenary. See State v. Pollander, 167 Vt. 301, 304, 706 A.2d 1359, 1360 (1997) (questions of law reviewed de novo); State v. Madison, 163 Vt. 360, 371, 658 A.2d 536, 543 (1995) ("review de novo" commonly used to describe nondeferential on-the-record standard of review that appellate courts apply to lower court determinations regarding questions of law or mixed questions of law and fact).

I.

The quarry over which the parties are asserting ownership has a vertical wall on the east, approximately one hundred feet in height, and a slant wall on the west. The east wall holds black slate while the west wall holds green. The quarry is roughly bounded on three sides by two lines of dumped slate on the surface beyond the terminus of the east

and west walls and by a rock divider to the south. To the north lies the so-called "Jones Quarry," purchased by appellant's father-in-law, Ted Pafundi, from their neighbor, Marguerite Scott, in 1971.[1]

In 1972, Ted Pafundi acquired additional property from Marguerite Scott, what was then referred to as the "Scott Quarry" and later as the "Pafundi Quarry," which is the parcel contested in this case. The deed vaguely described the eastern boundary of the acquired property as "the westerly boundary of the lands of Rising & Nelson" (the neighboring property owners at the time). The trial court found that "[w]hen Rising & Nelson owned what is now the N.A.S. property, no one in that firm knew the location of their west boundary." Ted Pafundi began quarrying operations in this quarry in 1972, primarily extracting green slate from the slant wall on the west side of the quarry.

N.A.S. acquired the property from Rising & Nelson in 1992. Though no one at Rising & Nelson knew the location of their western boundary and no one from the firm had ever enforced a boundary at the quarry, the survey conducted by N.A.S. upon their acquisition of the land revealed that virtually the entire quarry was within Rising & Nelson lands and that Ted Pafundi had in actuality purchased only a small strip of land to the west side of the quarry.

The current conflict arose when N.A.S. attempted to begin operations in the quarry in 1992, and appellant blocked

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1. The two quarries were formerly separated by a rock divider, but this was removed by the Pafundis in the late 1970s, creating one continuous pit.

access to the quarry. N.A.S. filed suit seeking to establish its superior title to the quarry. Appellant conceded the issue of record title, but maintained she had achieved title to the quarry through adverse possession. The trial court concluded that the Pafundis' use of the east and west walls of the quarry was of insufficient duration to establish adverse possession of the walls, though they did establish adverse possession of the quarry floor as it was the base of operations for the quarrying activity that took place.

To achieve title through adverse possession, a claimant must demonstrate that possession of the land was open, notorious, hostile and continuous throughout the statutory period of fifteen years. See Higgins v. Ringwig, 128 Vt. 534, 538, 267 A.2d 654, 656 (1970); 12 V.S.A. § 501. While the trial court concluded that the Pafundis' possession of the quarry was clearly open, notorious, and hostile, the evidence was less conclusive concerning the location and continuity of the possessory acts. The court determined that while Ted Pafundi worked the west wall of the quarry more or less continuously from 1972 until his death in 1979, and his son, Gary Pafundi, had worked the east wall of the quarry more or less continuously from 1979 until his death in 1989, neither of the walls of the quarry had been used continuously for the fifteen-year statutory time period. Nonetheless, because the floor of the quarry was the base of operations for both Ted and Gary Pafundi between 1972 and 1989, they had successfully established adverse possession of the quarry floor. Disconcerted by this awkward result, the trial court invited further briefing by the parties.

Appellant argued in a post-trial motion that her claim based on actual use and possession of the quarry should

succeed because the evidence showed that moving from wall to wall was consistent with the manner in which the quarry would be used by an average owner and with the nature of the property. See Darling v. Ennis, 138 Vt. 311, 313-14, 415 A.2d 228, 230 (1980) ("Continuity of use is merely such use as an average owner would make of the property, taking into account its nature and condition."). Appellant further argued that the quarry was clearly bounded and must be thought of as a single physical and economic unit, and that it was therefore illogical to grant title only to the quarry floor.

In its final judgment order, the trial court concluded that, because the pits themselves are not clearly bounded, and because the quarry could theoretically be operated by multiple persons at once, one can not necessarily conclude "that to establish ownership in the base of the quarry is to own the sides." This appeal followed.

II.

A claim of adverse possession that proceeds under bare claim of right extends only to that property which the claimant has actually occupied. See Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 156, 559 A.2d 1068, 1070 (1989). A claimant may also, however, seek to prove ownership through constructive possession, the doctrine under which a claimant achieves possession of an entire plot of land through actual occupation of a part. See id. The trial court erred in failing to apply the doctrine of constructive possession to this case, instead proceeding directly to analyzing the Pafundis' use of the various parts of the contested property without first explicitly categorizing

it as an actual possession or constructive possession claim.[2] This was error because such categorization is a threshold inquiry necessary to the assessment of the claimant's possessory acts.

Vermont has long recognized two methods of achieving constructive possession: (1) when the claimant is operating under color of title[3] and (2) when the land is marked by clear

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2. Appellant exacerbated the problem by referring to her claim as one of actual possession, when her argument was based on the theory of constructive possession, a fact recognized by appellee in its brief, where it refutes the constructive possession argument. (Appellant subsequently argues in her reply brief that she could succeed under either an actual or constructive possession theory.) The theory was forwarded, if unforcefully, by appellant and was clearly in the case. Appellant cited Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 559 A.2d 1068 (1989), in her post-trial motion for the proposition that actual possession of a part can establish constructive possession of the whole only where the claimant proceeds under color of title or where the lot is marked by clearly defined boundaries. Appellant pointed out that the quarry had "very definite boundaries marking the limit of possession on the eastern side," namely, "a line of slate dumps [lying] atop the butt along the eastern side of the quarry creating a vertical wall running the entire north/south length of the western side of [Rising & Nelson's] land." Referring to the clear boundaries around the quarry to argue that there was "actual possession" of the entire quarry is — despite appellant's insistence on referring to it as a claim based on "actual possession" — the essence of a constructive possession claim.

3. Claim of title, or "color of title," is present where "[a]ny fact, extraneous to the act or mere will of the claimant . . . has the appearance, on its face, of supporting [the claimant's] claim of a present title to land, but which, for some defect, in reality falls short of establishing it." Black's Law Dictionary 241 (5th ed. 1979).

and definite boundaries. See id. (where there is neither color of title nor definite boundary marks on the land, adverse possession extends only as far as claimant has actually occupied and possessed land); Thurston v. Batchellor, 100 Vt. 334, 341, 137 A. 199, 202 (1927) (marking claim to land with fence has same effect as proceeding under color of title; that is, it "extends acts of possession on any part of the land to the boundary so marked"); Lang v. Clark, 85 Vt. 222, 233, 81 A. 625, 630 (1911) ("[A]ctual possession of a part of a lot may give constructive possession of the whole lot if it has boundaries sufficiently well indicated by whomsoever those boundaries may have been erected or indicated upon the land."); Rice v. Chase, 74 Vt. 362, 366, 52 A. 967, 968 (1902) (for actual occupation of part to establish constructive possession of whole, claimant must act under claim to whole either because the boundaries are clearly marked or because the claimant operates under color of title).

The trial court did not respond to the case law (cited by appellant in her post-judgment motion) holding that possession of a part established possession of the whole when a claimant proceeded under color of title or when there were clear boundaries on the claimed property. Instead, the trial court focused on the morass of factual issues concerning which portions of the quarry the Pafundis consistently worked and whether the quarry must be thought of — on an abstract level — as a single physical and economic unit. This analysis is ultimately the same analysis necessary under a constructive possession framework; however, the trial court did not make use of the related case law to give the analysis its proper legal effect. As a result, the trial court did not apply the doctrine to the facts presented to draw a conclusion

concerning whether the subject property possessed sufficiently clear boundaries.

Nonetheless, the trial court did make findings to the effect that the quarry was a distinct and recognizable parcel:

> The configuration of the quarry is quite clear once one visits the site. The east butt is a nearly vertical wall over 100 feet high. There are slate dumps from many years ago along the ridge to the east. The west slant is a sharp, perhaps 45 degree or more in places, slope to the west. It too is topped with slate dumps from years past.

Furthermore, in the judgment order, the trial court acknowledged that Connie Pafundi had record title from the slate dumps on the west side to the survey line, located somewhere down the slant face on the west side of the quarry. This shows both that the western-most boundary is not in dispute, as appellant has record title to it, and that the slate dumps are an acknowledged and clear surface demarcation of the quarry boundaries.

III.

In light of this discussion, the issues on appeal can now be addressed succinctly. First, the trial court's holding concerning the quarry floor is affirmed. The appellant prevailed on this issue below; therefore the evidence is viewed in the light most favorable to her. See Brown, 150 Vt. at 109, 550 A.2d at 3. The findings of the trial court were supported by credible evidence, and there was no misapplication of law.

Appendix A

In arguing that the trial court erred by concluding that appellant had achieved adverse possession of the quarry floor, appellee argues that (1) the Pafundis did not use the quarry floor continuously and (2) appellant did not present evidence of how an average quarry operator would have used the contested land. On the second point, appellee cites no law requiring claimants to present evidence specifically directed to the issue of average use. Rather, "average use" is a standard that has developed in the case law and that is to be used by the trial court in assessing a claimant's possessory acts. The testimony at trial of individuals involved in the quarry business provided a sufficient evidentiary basis for the court to draw conclusions as to average use.

Additionally, appellee fails to show that the trial court lacked credible evidence to support its finding that the use of the quarry floor was continuous. The kind and frequency of acts of occupancy depend on the condition of the property, the uses to which it is adapted, and the intentions of the claimant. See Barrel v. Renehan, 114 Vt. 23, 29, 39 A.2d 330, 333 (1944); Stephenson v. Wilson, 6 N.W. 240, 241 (Wisc. 1880) (mining operations need only be "constant and continuous as the nature of the business and customs of the country would permit or allow"). It is well established that there may be lapses of time between acts of possession. See Montgomery, 125 Vt. at 365, 216 A.2d at 43. Whether the amount of time between acts of occupancy interrupts the running of the period depends on circumstances and intention of occupier. See Barrel, 114 Vt. at 29, 39 A.2d at 333.

In this case, it is hard to imagine how the Pafundis would have acted any differently toward the land had they held

record title to it. See, e.g., A. Charles Bussen Trust v. Kertz, 723 S.W.2d 922, 929 (Mo. Ct. App. 1987) (fact that claimant engaged in quarrying activities in the disputed area and engaged in continuous preparation of the land for excavation "showed [the claimant] occupied the disputed area as his own"). The evidence shows that Ted Pafundi began working in the quarry shortly after purchasing it.[4] Though his son Gary also pursued other lines of work, he assisted his father in the quarry over the years, and transitioned to operating the quarry after his father's death. The periods of time when operations slowed or stopped are consistent with the exigencies of a family-run business. It is clear the Pafundis intended to continue working there. A claimant's use of the land need not be optimal. See Jarvis v. Gillespie, 155 Vt. 633, 639, 587 A.2d 981, 985 (1991) ("Simply because a parcel may be susceptible to uses other than those to which the claimant chose to put it does not necessarily lead to the conclusion that the claimant failed to act toward the parcel as an average owner would have."). The Pafundis planted their flag on the land and left it unfurled, not always working the land to its maximum capacity, but certainly never retreating in their claim to it. See Barrel, 114 Vt. at 29, 39 A.2d at 333 (claimant must "unfurl his flag on the land, and keep it flying" to give the owner notice of occupancy). There

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4. Appellee argues that quarrying is an act of trespass, not possession. This argument has no merit. See A. Charles Bussen Trust, 723 S.W.2d at 928-29 (quarrying activities in the disputed area are acts of occupancy sufficient to establish adverse possession); Carrington v. McNeil, 396 N.Y.S.2d 286, 287-88 (N.Y. App. Div. 1977) (use of property as quarry and for storage of quarrying equipment, along with at least partial fencing and payment of taxes, are acts of occupancy sufficient to establish adverse possession).

was continuous notice of occupancy. The fact that this went unnoticed by Rising & Nelson was due to the fact that it was entirely absent from the land and unaware of its boundaries. There is sufficient credible evidence to uphold the trial court's ruling as to the quarry floor.

Second, the trial court's holding concerning the remainder of the quarry is reversed. The appellee prevailed on this issue below; therefore the evidence is viewed in the light most favorable to N.A.S. Nonetheless, the trial court misapplied Vermont law to the facts of this case. The trial court should have assessed the evidence in light of the fact that this was a clearly bounded piece of property, instead of first assessing actual use, and only then considering on an abstract level whether the parcel was "a single physical and economic unit."

The trial court essentially subsumed the question of the physical nature of the property into the question of average use (i.e., would the average owner use different walls at different times; could more than one operator theoretically work the quarry), rather than treating it as an issue of notice, which is the true concern of the constructive possession doctrine. The question is whether the holder of record title would understand the extent of the property claimed by the claimant's "unfurled flag."

Here, the findings of the trial court indicate that the boundaries on the surface of the land were definite, and these findings should have been given their proper legal effect. The court observed that "the configuration of the quarry is quite clear" and recognized the slate dumps as obvious

features on both the eastern and western sides of the quarry. The slate dumps on the western side of the quarry establish one of the boundaries of the parcel which Ted Pafundi did, in fact, purchase. The trial court made no finding that Rising & Nelson ever transgressed the slate-dump boundaries.

While the trial court did examine the issue of whether the quarry was a "single physical and economic unit," it conducted this inquiry without reference to the relevant case law. Furthermore, it answered this question by considering whether more than one operator could theoretically work the quarry. The relevant legal issue, however, is the objective physical characteristics of the property, that is: Would it appear as a bounded parcel so that a person observing occupation of some part of it would be on notice as to the extent of the claim?

If there are clear boundaries on the claimed property, actual possession of a part results in constructive possession of the whole. See Community Feed Store, 151 Vt. at 156, 559 A.2d at 1070; Lang v. Clark, 85 Vt. at 233, 81 A. at 630. Here, the trial court made findings of fact indicating that the property was clearly bounded. Therefore, the conclusion that appellant had established adverse possession of the quarry floor necessarily leads to the conclusion that she established adverse possession of the entire quarry.

Some question remains as to the exact location of these boundaries for purposes of describing with precision what land has been possessed by appellant. This is an issue properly dealt with by the trial court, and therefore we remand it. Appellee N.A.S. argues that the lack of such specificity

defeats appellant's claim altogether.[5] Mere lack of specificity in boundaries, however, does not defeat a constructive possession claim. In another constructive possession case, this one under color of title, we held that where a record title owner was confronted with uncontroverted evidence of occupation,

> the burden was on the [owners] to show any competing evidence of possession or intrusion affecting the land claimed by [claimants]. . . . [Owners] rested their case simply on their record title and the fact that the boundary lines of [claimants'] parcel were not readily deducible

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5. Appellee also argues that constructive possession can be achieved only pursuant to a deed that clearly describes the property in terms of metes and bounds measurements, a position that is in direct conflict with our case law, which also recognizes constructive possession claims where a lot has clearly marked boundaries. See Community Feed Store, 151 Vt. at 156, 559 A.2d at 1070.

Appellee additionally argues that the quarrying activity established possession only of the stone already quarried, and that appellant can therefore lay no claim to anything beyond the surface of the quarry as it now exists. This proposition is only true, however, in cases where mineral and surface rights have been severed from one another. See White v. Miller, 139 N.Y.S. 660, 663 (N.Y. Sup. Ct. 1912) (where surface and mineral rights have been severed, the mere opening and working of quarry does not establish adverse possession to anything beyond the face of the quarry, but "where there has been no severance between the title to the surface and that to the minerals beneath, one entering upon the surface and conducting mining operations thereon is in adverse possession both of such surface and of the minerals"). There is no severance here.

> from the deed. This is insufficient to establish ouster as a matter of law. . . . [T]he issue of adverse possession has been settled . . . [and t]he only matter for determination is the fixation of the boundary lines of the lot to which the [claimants] are entitled.

Montgomery v. Branon, 127 Vt. 83, 89-90, 238 A.2d 650, 654-55 (1968). In this case, the statutory period passed entirely under Rising & Nelson's watch. Rising & Nelson never transgressed the slate dump boundary or sought to enforce any other boundary in the area. No one contested the Pafundis' use of the quarry until 1992, when the neighboring property changed hands.

"[C]ontinued satisfaction and compliance with a boundary marked on the ground is persuasive evidence which supports its selection as the correct division." Amey v. Hall, 123 Vt. 62, 67, 181 A.2d 69, 72 (1962). A line established by acquiescence for the statutory period of fifteen years prevails over the line established by a later survey. See id. at 68, 181 A.2d at 73. Here, Rising & Nelson recognized the boundaries by default. Rising & Nelson's complete absence from the contested area implies acquiescence to whatever boundary line the Pafundis observed. This is the principle underlying the doctrine of adverse possession: That a landowner so inattentive as to permit occupation of its land for fifteen years must accept the subsequent loss of title. The limited factual issue to be determined by the trial court on remand is the precise location of the boundary lines based on the obvious physical characteristics of the property.

Finally, appellee asserts two evidentiary errors; both rulings are affirmed. The trial court has broad discretion in issuing an evidentiary ruling, and we review such rulings only for abuse of discretion. See Haynes v. Golub Corp., 166 Vt. 228, 236, 692 A.2d 377, 382 (1997). Appellee contends that the trial court erred in refusing to admit evidence of appellee's damages from the allegedly wrongful injunction. V.R.C.P. 65. Appellee alleges that the injunction was wrongfully granted because appellant had no record title to the quarry and had never conducted a survey to determine the true boundaries of the land. This argument misapprehends the very nature of an adverse possession claim, which may be based on a claim of title, but which ultimately seeks to triumph over record title through bare possession. Upon request for an injunction, the court was faced with some form of occupation of the quarry by the Pafundis for the period between 1972 and 1989, and Rising & Nelson's complete absence from the land during that period. Given these facts, it was not error for the trial court to deny appellee's request to admit evidence of damages allegedly flowing from a wrongful injunction. Appellee also contends that the trial court erred by admitting evidence that appellant failed to produce prior to trial. V.R.C.P. 26. Appellee has not demonstrated nor made any argument that it was prejudiced by the ruling. See Gilman v. Towmotor Corp., 160 Vt. 116, 122, 621 A.2d 1260, 1263 (1992) (trial court's decision to admit or exclude evidence will not be reversed absent abuse of discretion resulting in prejudice). Appellee has failed to show that the trial court abused or withheld its discretion.

Appellant established, on the basis of facts found by the trial court, constructive possession of the entire quarry for the statutory time period of fifteen years.

Appendix A

Affirmed as to the question of adverse possession of the quarry floor, and reversed and remanded for further proceedings not inconsistent with this opinion and for establishment of the exact boundaries of the property.

FOR THE COURT:

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Associate Justice

APPENDIX B — OPINION AND JUDGMENT ORDER OF THE RUTLAND SUPERIOR COURT DATED OCTOBER 1, 1997

STATE OF VERMONT
RUTLAND COUNTY, SS.

RUTLAND SUPERIOR COURT

DOCKET NO. S719-92 RcC

N.A.S. HOLDINGS, INC.

Plaintiff

VS.

CONSTANCE PAFUNDI

Defendant

OPINION AND JUDGMENT ORDER

We issued findings of fact filed August 1, 1997, in this case of dispute of ownership to a slate quarry on the western border of Vermont in West Paulet. The result was unanticipated by the parties and the court when this case got under way. Usually one party or the other wins the argument as to possession of disputed property. Here, however, the court literally "went down the middle," finding that the adverse possession claimed by Connie Pafundi was established only as to the base of the quarry, not either of the two sides.

Appendix B

After the evidence closed, and we had studied the documents and other evidence presented, we began to conclude that adverse possession throughout the quarry had not been established for the required 15 years. Clearly, however, Ted Pafundi, and his son Gary Pafundi (Connie's deceased husband), had maintained a presence in the base of the quarry from September of 1972, when Ted obtained his deed from Marguerite Scott, until Gary died in a rock slide at the quarry in 1989.

As we began to see this odd result coming, it occurred to us that finding adverse possession for Connie to the quarry base but to neither side would do her no good. The valuable rock is the green to the west in the slant and the gray to the east in the butt. It is not clear, without someone placing Hecei's survey line on the ground in the slant, just where Connie's ownership of the green slate begins and ends. She owns the slate dumps on the west side, and how far down the slant her line should be located is unknown until a surveyor establishes the line on the ground. But with only ownership of the quarry base where she has established adverse possession, it will be difficult for her to conduct quarrying operations of green slate. Access must be from her property to the west. Likewise, losing ownership of the base through Connie's adverse possession effectively precludes N.A.S. from conducting quarrying operations for gray/black slate in the butt. Access must be from its property to the east.

While our ruling would not preclude quarrying operations for either party, it is not the kind of decision we would have liked, because neither party has access to its slate

from the most advantageous position, namely the base of the quarry. For that reason, we met with the attorneys to encourage a mediated result with which they could both live. We suggested that with the help of a mediator, they might forge a business arrangement to mutual advantage. Both parties being entrenched in their respective positions, our efforts at bringing this litigation to a mutually acceptable conclusion failed. We made our findings based on what we perceived was a preponderance of the evidence and invited the parties to respond with any useful suggestions.

At our recent hearing following the findings, plaintiff, N.A.S., expressed a desire simply for a judgment from this court so that it can carry this litigation to another level. Defendant, Connie Pafundi, filed a memorandum of law, in the nature of what we will consider a post trial motion to reconsider our findings. We have reconsidered, and we conclude we cannot change our findings. The evidence established that Ted and his son Gary worked the west side of the quarry in the green during the 1970s until Ted died. Ted was in charge of operations until he died, and there is no credible evidence that he pulled gray/black slate from the east side before his death. He did pull down the "divider," so-called, that connected the east and west sides of the quarry and which is now entirely gone. But this occupancy of the quarry only tends to establish possession to the base of the quarry, for that is where the divider was located. He pulled no rock from the vertical butt to the quarry on the east.

Gary, on the other hand, pulled his slate from the gray/black on the east side, probably because economic conditions for gray/black improved in those years following his father's

death. Evergreen's purchases of gray or gray/black slate establish his extensive work on that side of the quarry, and Gary was working on that side when he died. No credible evidence suggests that Gary pulled any slate from the west side of the quarry, outside of what is now the base and what was the divider.

Counsel for Connie Pafundi makes several good points in his memorandum, and we do not disagree with his view of the law of adverse possession. The facts, however, are not favorable to his argument. First, it is conceded that Connie could establish no record by title. Ted's deed described his easterly boundary only as the "westerly boundary of the lands of Rising & Nelson. Thus his property had an indefinite description, totally dependent upon the location of Rising & Nelson's west boundary. As we have found, the Hecei survey located this boundary somewhere in the west slant. Ted pulled green slate out of the west slant on both his and Rising & Nelson's land, working from the base of the quarry, until his death in 1979. Thereafter, Gary continued to remove the divider and centered his operations in the gray/black slate in the butt to the east until 1989. Pafundi quarrying operations, therefore, were never continuous in either the west slant or the east butt for a period of 15 years. The base of quarrying operations, however, remained centered in the base of the quarry throughout the period from 1972 through January of 1989, a period in excess of 15 years. Hence we found that Connie Pafundi had established adverse possession to the base of the quarry.

Proof of adverse possession requires a showing of open, notorious, continuous, and hostile possession for the full

statutory period of 15 years. *Lawrence v. Pelletier*, 154 Vt. 29, 33 (1990). Connie Pafundi in her memo makes the point that occupancy is not synonymous with use, and that continual use is not required to prove the element of occupancy or possession. This is true. Continuous use is not synonymous with constant use, and the continuity of use required is merely such use as an average owner would make of the property, taking into account its nature and condition. *Darling v. Ennis*, 138 Vt. 311 (1980) (citations omitted). We agree that there was not constant use of this quarry over the years because the nature of quarrying operations is such that they will be worked on and off as market conditions and the seasons require. If we had required constant use, we probably would have found that both Ted and Gary interrupted their quarrying operations at various times over the years, as the plaintiff sought to show.

The more serious point Connie Pafundi makes is that the evidence shows possession of the quarry for more than 15 years because, unlike open land, a quarry is like a box. How does one possess the bottom of a box without the sides? She argues that to quarry one side is to mine the whole quarry. She maintains that a quarry is a special purpose property, and the kind and frequency of the activity in the pit need only measure up to the nature and condition of the premises and the uses to which it is adapted. *Amey v. Hall*, 123 Vt. 62, 67 (1962).

While she may have had a valid point on slightly different facts, we respectfully cannot conclude in this particular case that a presence in the base of this quarry is a presence amounting to possession or occupancy of both sides.

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The history of this quarry indicates operations by different people at different times, on one side or the other, but no evidence suggests that any one operator pulled rock from both sides of the quarry during any given period. This is a very large quarry, a fact which is not readily apparent until one visits the site. Because of the different colors of slate on each side, and the fact that the Rising & Nelson side of the quarry is the butt, a vertical wall over 100 feet high, it does not necessarily follow that to quarry the slant of green slate to the west is to lay claim to the gray/black slate in the butt to the east. Likewise, it does not follow that to quarry the gray/black on the east side is to lay claim to the green on the west. This quarry could easily have been, and could be today, the subject of a joint operation: one owner quarrying the green to the west, while another operator quarries the gray/black to the east. One could not say this of other quarries, including those quarries nearby or others in the area. Each quarry is somewhat unique.

Supporting a finding of adverse possession in the base is the fact that Gary pulled much of his rock from the center of the quarry, either in the divider or at the south end near the "Tuff Guy" pit. This particular quarry is wide at the bottom, and Gary contributed to much of its width by reconfiguring the access road, taking out the divider, and filling in the low spots in the base. Unfortunately, his records do not support a mining operation in the west slant green slate over the years after his father died.

Therefore, while we agree that possession is proved if the acts of dominion are such as the claimant would exercise over his own property, especially where the acts of dominion

are consistent with such operations as the property is reasonably adapted to, the facts of this case do not prove by a preponderance of the evidence an occupancy and possession with respect to both sides of this quarry for the full period of 15 years. We are constrained to confine adverse possession to the base of the quarry.

We issue the following judgment order:

Record title is proved to be in the plaintiff pursuant to the Hecei survey in evidence, and the defendant's adverse possession is proved to have been established for a period in excess of 15 years as to the base of the quarry, which is that portion of the disputed property that lies from the base of the butt of the quarry to the beginning of the slant to the west, including the upper and lower roads, so called.

Because both parties prevailed in this case on one or more aspects of their claims, we respectfully conclude that the parties should bear their own costs.

Dated at Rutland this 1st day of October 1997.

s/ Alden T. Bryan
Alden T. Bryan
Presiding Judge

APPENDIX C — FINDINGS OF FACT AND OPINION OF THE RUTLAND SUPERIOR COURT DATED AUGUST 1, 1997

STATE OF VERMONT
RUTLAND COUNTY, SS.

SUPERIOR COURT

DOCKET NO. S719-92 RcC

N.A.S. HOLDINGS, INC.

Plaintiff

VS.

CONSTANCE PAFUNDI

Defendant

FINDINGS OF FACT AND OPINION

Introduction:

This rather sad, but interesting, case was tried to the court over several days. It concerned a boundary dispute between the parties over some slate quarries in the Town of Pawlet. The quarry in question here is among a chain of slate quarries in the hills in West Pawlet near the Vermont/New York line. Plaintiff, N.A.S. Holdings, Inc., is a Vermont corporation owned by three individuals, Robert Tatko, his father Everest Tatko, and Royal M. Harrison. Harrison bought a parcel of land in West Pawlet in 1992 from Rising & Nelson Slate

Company, Inc., a firm that had been in the slate business many years, going back almost to Civil War times. In recent years, its owner, Jim Mertz, had become elderly, and he had gradually begun selling off its holdings. Rising & Nelson still exists today and buys and sells roofing slate, but it owns or operates no quarries.

About a month after Harrison bought the parcel from Rising & Nelson, Harrison conveyed it to himself and the Tatkos, who then conveyed it to N.A.S. Holdings, Inc., on the same day, July 22, 1992. N.A.S. claims title to the quarry in question in this litigation by virtue of being a successor in title to the parcel that Rising & Nelson sold to Harrison. One of the disputes in this case concerns the record title and the location of the N.A.S. westerly boundary with respect to the quarry in question.

Constance (Connie) Pafundi is a young woman, widow of Gary Pafundi, whose father, Ted Pafundi, Sr., had conducted a quarrying operation and mill with his wife Lucille in West Pawlet since about 1971. Ted Pafundi had been in the slate business years earlier but had left it for a number of years, returning in May of 1971 when he bought what is now known as the Jones Quarry. The next year, in September, he purchased a parcel of adjacent land from Marguerite B. Scott and began quarrying operations in what is now the quarry in dispute.[1] His east boundary in that parcel was described only as the "westerly boundary of the lands of Rising and Nelson." Defendant's Exhibit 52C. Along with

1. Ted Pafundi also purchased other parcels in this area relating to quarrying operations, but they are not pertinent to the dispute in this case.

his quarrying operations, he built or expanded a milling operation north of and adjacent to the Jones Quarry, from which he sold finished slate. Ted had had a stroke in November 1974, and Gary, then age 17, and his younger brother began doing much of the work in the business, especially in the quarry pit. Ted Pafundi died in December 1979, by which time his son Gary had largely taken over operation of the quarry and mill.

Gary was an experienced mechanic, an energetic individual, smart and well liked in the community. He easily grew into the slate business and, with his father overseeing the business, expanded the operations. After Ted died at the end of 1979, Gary took over full responsibility for the operations. In June of 1980, he leased all the quarry properties from Slatile, Inc., his parents' corporation. Defendant's Exhibit 65. In dispute in this case is the degree to which Gary pursued quarrying operations in the early 1980s, a subject we will turn to in the section on adverse possession. It is sufficient to say here that Gary Pafundi was in charge of the quarrying and milling operations from the date his father died in December 1979 until Gary himself died in a rock slide at the quarry while operating one of his excavators on January 30, 1989. By that time, the business earned well in excess of a quarter of a million dollars a year. At the time he died, Gary had purchased the quarry properties from his mother and a sizeable amount of equipment. There is no doubt that by 1985 he was full time in the quarrying business. He died with debts for equipment of approximately $250,000. He had two excavators, a mammoth International loader, one other loader, two Uclids, several trucks, and miscellaneous other equipment for the quarrying operations. The mill was

in full swing. In 1986, the income alone from a local prominent slate broker, Evergreen Slate Company, was nearly $238,000. After Gary's death, Connie sold off all the equipment except the huge loader, probably now unsaleable, and the operation went out of business. The quarry and mill closed after Gary's death. What she can or will do with the quarry and the mill largely depends upon the outcome of this lawsuit.

The dispute here began in 1992 when N.A.S. came to the property and attempted to begin quarrying operations. The issues involve the location of a north/south boundary line and adverse possession. When Rising & Nelson owned what is now the N.A.S. property, no one in that firm knew the location of their west boundary. There is some evidence that Jim Mertz, the elderly owner of Rising & Nelson, had been aware of its location, but he had either forgotten or failed to enforce the boundary. When Harrison bought the parcel from Rising & Nelson, Stephen William, Rising & Nelson general manager who handled the sale and signed the deed, walked the land with Harrison and showed him some in-house maps. When they walked the land, Williams showed Harrison the general boundaries, but they did not walk the west side. Williams pointed out the slate dumps on the west ridge of the quarry pit, which he said he didn't think belonged to Rising & Nelson. Accordingly, when N.A.S. purchased the property, it engaged a surveyor, Timothy R. Hecei, to locate the boundaries. His work was completed in November 1992, and resulted in Plaintiff's Exhibit 2 and Defendant's 55, survey plats of the Harrison parcel purchased from Rising & Nelson. For reference, we have marked a Court Copy of Plaintiff's 2 as Court 2A, 7/30/97, ATB. This

copy was used during the trial and marked by the Court in connection with some of the testimony. The Rising & Nelson parcel sold to Royal M. Harrison in June 1992, is depicted with a green boundary. The lands of Marguerite Scott Ellis are shown to the west and marked with a blue boundary.

The quarry in question in this case is shown on the aerial photograph Plaintiff's 4, marked as Pafundi. It is marked with a highlighter, which includes the access to the quarry from the Warren Switch Road, so called. The mill is visible on Plaintiff's 4, but is hard to see unless you know exactly where it is. It is shown most clearly in Photo 74G in the book of Connie Pafundi's aerial photos. It consists of the buildings to the left of the Jones Quarry, which Ted owned but didn't quarry because of excessive water. The quarry in question is partially shown to the right in the photo, marked Pafundi. Photo 74J shows the mill in the lower right and the Pafundi quarry in the upper left. The Pafundi quarry, of course, is the one in dispute.

The ownership of the mill property is not in dispute. Only the Pafundi quarry and some of its access road is in question. As mentioned earlier, when Ted Pafundi bought the Marguerite B. Scott parcel on September 20, 1972, the easterly boundary of the conveyance was described and located as the "westerly boundary of lands of Rising & Nelson and lands of Kehoe . . . ." (Kehoe is irrelevant for the purposes of this case.) A study of the deed reveals that Ted Pafundi got no more by way of description than can be proved to be the lands of Rising & Nelson. The deed is confusing, and upon careful analysis with all the information in the survey at hand, no one, including the surveyor, can make any sense of much of it. There was no way to determine

Scott's east boundary. To find out where it is, one must first locate Rising & Nelson's west boundary. Tim Hecei proceeded in that fashion, and his survey shows the Rising & Nelson west line.

On the Court's 2A, we have highlighted in pink Hecei's notations: "To Bottom of Quarry," "Bottom of Quarry," "Bottom of Quarry" (farther south), "Top Edge of Cliff to Quarry," "110 Vertical Drop," and "Slate Dump." All these lie within the Rising & Nelson boundaries and therefore lie to the east of the lands Marguerite Scott conveyed to Ted Pafundi, Sr. The vast majority of the Pafundi quarry lies in the Rising & Nelson parcel and is not in the parcel that Marguerite Scott conveyed to Ted Pafundi, Sr. on September 20, 1972.

We confirmed our previous finding with a visit to the site in the company of Connie Pafundi, Bob Tatko, and counsel. There is no question as to the location of the bottom of the quarry, the cliff, the 110 foot vertical drop, and the slate dump. These all lie within the boundaries of Rising & Nelson, and therefore outside the Scott to Pafundi conveyance of September 20, 1972. Except for perhaps a narrow strip near the top of the west slant, Gary's father purchased no land that lies within the quarry.[2]

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2. The slant and the butt are opposite sides of a normal quarry. The butt is the vertical side, in this case over 100 feet high. The opposite side, the slant, is a slope, approximately 45 degrees from the bottom of the quarry to the surface, again over 100 feet high in this quarry. The butt here is on the east side of the quarry toward the Rising & Nelson lands. The slant here is on the west side, toward the former Scott property. In this quarry, the butt is gray black slate. The slant is sea green slate.

Appendix C

At the end of the case in chief, meaning the plaintiff's case to establish record title, we were satisfied to the degree of clear and convincing evidence that Ted Pafundi obtained no more than a narrow strip of land on the west side of the quarry. We had then, and have now, full confidence in the Hecei survey. There is no credible evidence to the contrary. We made findings and conclusions on the record at the hearing, and on the question of record ownership, we concluded that all of the useful portions of the quarry belonged by record to the plaintiff, N.A.S. Holdings, Inc. We granted judgment on the question of record title to the plaintiff, and we confirm that ruling now. The remaining question left in the case concerns adverse possession, and we turn now to that issue.

Adverse Possession:

As we have found, Ted Pafundi, Sr. purchased a parcel of land in Pawlet from Marguerite Scott on September 20, 1972, and it was located almost entirely outside the Rising & Nelson quarry marked on Plaintiff's 4 as Pafundi and shown on Connie Pafundi's photo 74G. In fact, one does not cross the west boundary on Exhibit Court 2A until the right turn on the access road beyond the Jones and Warren quarries, shown clearly on Connie's photo 74G. The curve was moved a few feet to the east by Gary when he created the lower access road, and we assume the curve shown on the Hecei survey is the curve we see there today on the lower access road. If precise location of the Rising & Nelson west boundary were to be located and marked on the ground, it probably would be half to two thirds up the slant from the bottom of the quarry to the west side slate dumps on the top.

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The point is that the boundary is in the west slant to the quarry in question, and there is no way to pull rock from the west slant and respect the ownership according to the record title.

Connie Pafundi asserts ownership of the entire quarry by adverse possession. To prove it, she must show open, notorious, hostile, and continuous possession for a period of 15 years. *Jarvis v. Gillespie*, 155 Vt. 633 (1991).

Ted Pafundi, Sr. died in December 1979, having begun quarrying operations in this quarry in 1972. The evidence is in dispute and not entirely clear where and at what times he and Gary conducted quarrying operations on the disputed property. There was a divider (section of rock bisecting the quarry), entirely gone now, and probably mostly gone by the 1980s, between the west and east sides of the quarry near the entrance road where it enters the property on the survey. Sea green slate was in the slant to the west, and gray black slate in the butt to the east. When Ted was alive, the evidence seems to show that he pulled predominately sea green slate from the slant on the west. After his father's death, Gary seems to have quarried gray black slate from the butt on the east side. He was working the butt when he was killed. During all operations from 1972 through the end of January 1989, when operations ceased after Gary's death, the quarry was worked from a base of operations in the bottom of the pit. Over the years, the configuration in the pit bottom changed considerably as the low spots were filled with waste and the floor leveled out. No one other than Ted or Gary worked the quarry from 1972 until 1989. Whenever there were operations in the quarry, it was open for all to see. Many

witnesses testified to personal observation of the Pafundi's operations. It was therefore notorious. No evidence suggests that they were there by lease or other permission of any kind. Their quarrying was hostile. The serious questions in this case are where their operations took place and whether they were continuous throughout a 15 year period.

Michael Plisko, who has worked quarries in the area for many years and knows what goes on around there, testified that Ted bought the west slant from Marguerite Scott and worked the green, but Gary worked the butt, which was the black. He said that before Ted and Gary, workers who quarried the black paid royalties to Rising & Nelson. Ted asked Plisko and his father where the lines were, and they told him. Gary knew as well. And this was before Ted had his stroke. Plisko testified that Gary never went into the black in the butt before his father died. He said that Jim Mertz of Rising & Nelson knew that Ted and Gary Pafundi were working in his quarry, but he never said anything about it.

Michael Plisko seemed to have more detailed local knowledge of who was doing what and where than anyone else who testified. His testimony is the most detailed and convincing. He seems somewhat hostile to Connie, however, probably because she apparently lays claim to about an acre of what Plisko thinks is his.

It is clear that several operators other than Rising & Nelson quarried in the pit over the years before Ted began his operations. Who they may have paid or whether they paid anyone is not clear. The evidence seems to show that most of these operations were on the west side in the slant.

To the extent that such operations were without the permission of Rising & Nelson and within its boundaries, the evidence is unconvincing that the operations were hostile. There may or may not have been royalties paid. We cannot find by a preponderance of the evidence that before Ted and Gary, anyone quarried in the pit hostile to the interests of Rising & Nelson. There is no adverse possession in favor of either Ted or Gary Pafundi prior to 1972.

We cannot find by a preponderance of the evidence that Ted quarried in the butt on the east side during his years of operation,[3] nor can we find that Gary quarried in the west slant after his father died in 1979. His operations primarily turned to the butt. We can find, however, that while either Ted or Gary conducted operations at the quarry, at all times they used the base or bottom of the quarry for their operations, whether working in the slant or the butt. The access to work either side is through the bottom of the quarry and extends from the entrance curve at the north end south to the other end of the quarry. The heavy equipment operations were conducted from there.

The most difficult question to resolve is the extent to which the quarrying operations over the years from 1972 through 1989 were continuous. Here there is considerable confusion in the evidence. Connie Pafundi and her mother-in-law, Lucille Pafundi, testified to a continuous quarrying operation from 1972 through 1989. Terry, Gary's brother

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3. While Gary may have conducted most of the quarrying operations after his father's stroke in November 1974, he worked for his father. We consider 1972 through 1979 Ted's years of operation.

who worked with him until 1977 and sometimes in the 1980s, never remembers the Scott pit (the one in question here) being out of operation. But he was away between 1977 and the early 1980s in Colorado much of the time. There are records, however, that cast some doubt on this testimony. As stated earlier, Gary was an accomplished mechanic. During most of the years up until 1985, when Gary filed income tax returns he listed his occupation or principal business as mechanic. During the first few years after his father died, Gary earned more income from his mechanical or construction work than his slate business. His slate sales were few in 1980. His total income in 1981, according to the records kept by Connie (Exhibit 70), was $67,466. Of that, $18,195 was from the slate business. Slate sales were $25,570 in 1982. His slate sales increased to $46,555 in 1983. The records from Evergreen Slate Company show that beginning in March of 1983, Gary sold slate to that company continually except for two months in 1983 and three months in 1984. Exhibit 62. Thereafter, he never missed a month. Gary's sales to Evergreen were gray black, meaning the slate probably came from the butt side of the quarry. Beginning in March of 1983, the evidence is clear that Gary was in the slate business with Evergreen continually to the end of his life, and the slate probably came from the butt side of the quarry. We find that Gary worked the east side of the quarry continually from March 1983 until the end of January 1989. He and no one else was in possession of the base of the quarry during that period, and no one else work the quarry. His possession was open, notorious, hostile, and continuous during that period. But it was not for 15 years.

Appendix C

From the date of his father's death in December 1979 until March of 1983, the evidence is conflicting. No one but Gary was in the quarry during that period, but Gary's operations were not consistent. He was still earning much, if not most, of his income as a mechanic or construction worker. He was beginning to accumulate equipment, and there were slate sales. It is difficult, however, to find continuous possession. On the other hand, no one else exercised possession during this time. Undoubtedly, equipment was at the quarry, if unused, most of that period. However, even if we find that Gary maintained possession of the east butt during that period, he would be almost 6 years short of adverse possession.

Up until the time of his stroke in November 1974, there seems to be little dispute that Ted was in the business and he was quarrying from the pit in question, mostly sea green. By a preponderance of the evidence, we find that he was using the base of the quarry to move slate in and out, and he was extracting rock from the west slant where the slate was sea green. According to his wife Lucille, Ted was good friends with Jim Mertz, who would have known where Ted was removing rock. Plisko says the bu[illegible] in that quarry belonged to Rising & Nelson and the slant belonged to Scott. Ted purchased the slant from Scott. It stands to reason that if Ted was a good friend of Mertz, and if Mertz did not know or remember precisely where in the slant his line was located, he might well have assumed that Ted owned where he was extracting rock and had no objection to his using the base of the quarry on Rising & Nelson land for hauling out the stone and general removal operations. All the evidence is quite conflicting, but on balance we find by a preponderance of

the evidence that Ted pulled rock from the slant before his stroke. Whatever rock was pulled from the quarry after his stroke also came from the slant. Records show sea green sales in 1979 to Rising and Nelson. There is no credible evidence that while Ted was alive, he or Gary as his employee, removed gray black slate from the butt side of the quarry. We therefore cannot find that from 1972 through 1989, there was continuous possession adverse to Rising & Nelson on the east or butt side of the quarry. Connie Pafundi cannot establish adverse possession to that portion of the pit.

Assuming that Ted Pafundi quarried the sea green slate in the west slant from 1972 through to his death in December 1979, he is well short of continuous possession for 15 years. By the early 1980s, the bridge at the entrance near the Warren pit was gone, and there were no significant operations in the west slant thereafter. As we said earlier, Gary worked the east side. We cannot find adverse possession for Connie Pafundi in the west slant.

We turn now to the base of the quarry. The entrance road comes in from the Warren Switch Road to the west. Where it enters the surveyed lands of the Harrison purchase in 1992, it turns right as the access road to the quarry. At one time it rose steeply and went toward the south. As testified to by Terry, they removed the divider between the Scott and Jones quarries and it was completely gone by 1980. From there, the quarry was worked to the south, and on the east or butt side after Ted's death. There had to have been continuous use and possession of the quarry base before Ted had his stroke in November of 1974 and after Gary began

selling slate to Evergreen in March of 1983. Of that, we are certain. There was too much activity in the west slant in the early years and in the east butt in the later years not to consider it the establishment of possession. For the period from November 1974 through February 1983, the evidence is difficult to sort out. Ted stayed in business, and Slatile was in business until he died. We have no good sales records to establish how much slate was sold and where it came from. Much of the slate that Ted and Lucille sold from 1975 through 1979 may have come from other quarries. Gary was not employed entirely by his father during this time. He did not marry Connie until after his father died, and she was not in the picture until 1978. She does not have an accurate personal knowledge of the quarrying business in those years. She is truthful when she says that Gary was working in the pit after she met him in 1978, but she cannot personally testify to the true extent of the quarrying operation. Gary leased the pit from his mother pursuant to a lease dated June 10, 1980. Gary bought an excavator in 1980. His slate sales began to increase significantly in 1981. We find by a preponderance of the evidence that Gary was getting started and on his way after he leased the property from his mother, and for all practical purposes he was exercising control over the Scott or Pafundi pit thereafter. While there is evidence that quarrying operations were low from 1975 through 1980 and some records of the federal mine authorities tend to indicate little or no activity during portions this period, and about 1984, we are convinced by a preponderance of the evidence that after Ted's stroke in late 1974, he and Gary kept up sufficient and continual quarrying activity in the base of the quarry to establish a presence amounting to possession. No one else was in that quarry during the period from

September 1972 through the end of January 1989. By September 1988, sixteen years had passed. Gary died and the quarry closed slightly more than four months later.

Conclusions:

We conclude that adverse possession is not established in the west slant within the former Rising & Nelson parcel because it had not been maintained adversely to the owners continuously for 15 years by the time quarrying ceased there after Ted's death. Additionally, possession there is otherwise somewhat problematical because, as we have indicated, we do not know just where the line is in the west slant, and there is the distinct possibility that Ted's use of that side of the quarry was not entirely hostile to the interests of his friend Jim Mertz. Likewise, we conclude that adverse possession of the east butt of the quarry is not established because Ted did not draw slate from that side. Connie's claim through Gary's operations there is insufficient in time.

On the other hand, Ted and Gary together established possession of the base of the quarry that was open and notorious, hostile and continuous, for a period in excess of 15 years. Connie has established adverse possession to the quarry floor and all of the roadway leading from her land into the area. It is not necessary to actually be conducting operations throughout the entire year or even every year. The question is how the one claiming adverse possession acted toward the property, considering all of the circumstances, including the kind of use to which the property was being put. *See, Jarvis v. Gillespie, supra*, and cases cited therein.

Appendix C

The configuration of the quarry is quite clear once one visits the site. The east butt is a nearly vertical wall over 100 feet high. There are slate dumps from many years ago along the ridge to the east. The west slant is a sharp, perhaps 45 degree or more in places, slope to the west. It too is topped with slate dumps from years past. The floor of the quarry is wide and distinct, having been extensively reconfigured, leveled, and widened by Gary, probably during his later years of extensive operations.

As is clear from the survey, not all pits are wholly within boundaries. Different owners can work different sides or portions. The pits change over time, are enlarged, reconfigured, leveled, and deep or wet spots are filled in. The ease with which stone can be moved with heavy equipment today, as compared to the donkey engine days or hand work of even earlier years, makes for a better organized pit today. It does not necessarily follow that to establish ownership in the base of a quarry is to own the sides. A quarry is not like a pasture, where grazing animals tends to establish possession of the entire lot. We would think that to establish possession of a quarry, one must exercise possession over some sort of natural or obvious spot, such as the slant or butt in this quarry. Quarrying the slant in various places, as was done here, might well establish possession of the slant. Likewise, possession of the east butt could have been established in the same fashion.

On the other hand, it is difficult to understand how one could work either side without access to the quarry floor. Conversely, does it make any sense to have established possession of the quarry floor? The quarry is of no use to Connie Pafundi, if she has established title only to the base.

Appendix C

In our conferences with counsel since the conclusion of the evidence, we have expressed a concern that the facts of this case might lead to a less than satisfactory conclusion. The facts have been sharply contested with respect to each side of this quarry, and this has shifted attention away from the law that might apply. Now that the facts have been found, the Court would appreciate a more extensive briefing. If Ted Pafundi had received a deed purporting to give him title to a parcel specified by metes and bounds which contained this quarry, we would have a different situation. As it is, he and his successors have no claim in the records to anything but an upper portion of the west slant.

We invite counsel to submit additional briefing to aid the court in its conclusions. At this point, we cannot conclude that Connie Pafundi has established title to any more of the quarry that its base, which is useless to her and renders the rest of the quarry unfit for operations. Counsel are also invited to suggest any practical solutions.

We will confer with counsel in September.

Dated at Rutland this 01- day of August 1997.

s/ Alden T. Bryan
Alden T. Bryan
Presiding Judge

APPENDIX D — ENTRY ORDER OF THE SUPREME COURT OF VERMONT DENYING MOTION TO REARGUE DATED AND FILED AUGUST 2, 1999

ENTRY ORDER

SUPREME COURT DOCKET NO. 98-044

JUNE TERM, 1999

N.A.S. Holding, Inc.

v.

Constance Pafundi

APPEALED FROM:
Rutland Superior Court
DOCKET NO. 719-92RcC

In the above-entitled cause, the Clerk will enter:

Plaintiff's motion to reargue, filed July 16, 1999 fails to identify points of law or fact overlooked or misapprehended by this Court. The motion is therefore denied.

BY THE COURT:

s/ Jeffrey L. Amestoy
Jeffrey L. Amestoy, Chief Justice

s/ John A. Dooley
John A. Dooley, Associate Justice

Appendix D

s/ James L. Morse
James L. Morse, Associate Justice

s/ Denise R. Johnson
Denise R. Johnson, Associate Justice

s/ Marilyn S. Skoglund
Marilyn S. Skoglund, Associate Justice